

IN THE COURT OF APPEALS OF TENNESSEE
AT KNOXVILLE
April 15, 2009 Session

**COMCAST OF THE SOUTH v.
ELECTRIC POWER BOARD OF CHATTANOOGA**

**Appeal from the Chancery Court for Hamilton County
No. 08-0291 W. Frank Brown, Chancellor**

No. E2008-01788-COA-R3-CV - FILED MAY 13, 2009

The Tennessee Cable Telecommunications Association (“TCTA”) is a trade association whose members primarily are owners of franchised cable televisions systems. One of its members is Comcast of the South (“Comcast”). In September 2007, TCTA filed a lawsuit against the Electric Power Board of Chattanooga (“EPB”). This lawsuit was filed in the Davidson County Chancery Court and sought a declaratory judgment that EPB was violating Tenn. Code Ann. § 7-52-603 by improperly using municipal electric utility funds to subsidize its recent cable/internet venture. In April 2008, Comcast filed the present lawsuit against EPB in the Hamilton County Chancery Court, also claiming that EPB was violating Tenn. Code Ann. § 7-52-603 by improperly using municipal electric utility funds to subsidize its recent cable/internet venture. EPB filed a motion to dismiss the present lawsuit claiming the complaint should be dismissed based on the doctrine of prior suit pending, because the claims were not ripe for review, and because the claims were preempted by federal law. The Trial Court determined that the doctrine of prior suit pending did not apply. However, the Trial Court further found that the claims were not ripe and, even if they were, they were preempted by federal law. The complaint was, therefore, dismissed. Both parties appeal. We conclude that the Trial Court erred when it determined that EPB had not proven the defense of prior suit pending. This lawsuit should have been dismissed on that basis. Thus, while we agree with the Trial Court that this case should be dismissed, we do so on a different basis. The judgment of the Trial Court is vacated to the extent the Trial Court dismissed the action because it was not ripe and because it was preempted as these issues are pretermitted. The judgment of the Trial Court is affirmed as modified.

**Tenn. R. App. P. 3 Appeal as of Right; Judgment of the
Chancery Court Affirmed as Modified; Case Remanded**

D. MICHAEL SWINEY, J., delivered the opinion of the court, in which HERSCHEL P. FRANKS, P.J., joined. JOHN W. MCCLARTY, J., not participating.

John M. Farris, Jamie R. Hollin, W. Travis Parham and Mike Stewart, Nashville, Tennessee, for the Appellant, Comcast of the South.

Joe A. Conner, Misty Smith Kelley, John M. Phillips, Frederick L. Hitchcock, T. Maxfield Bahner, and William R. Hannah, Chattanooga, Tennessee, for the Appellee, Electric Power Board of Chattanooga.

OPINION

Background

Comcast provides cable television and high speed internet services to the citizens of Hamilton County and surrounding areas. EPB is a municipally owned electric system that provides electricity to Hamilton County and parts of several surrounding counties. In April 2008, Comcast filed a lengthy complaint against EPB. Comcast filed its lawsuit pursuant to Tenn. Code Ann. § 7-52-601¹ *et seq.*, which allows municipal electric systems to provide cable television and internet services, subject to compliance with certain conditions and procedures. According to the complaint:

The Cable Act contains various provisions intended to ensure that municipally owned utilities do not engage in behavior that will harm the structure of the competitive markets. The Cable Act requires, for example, that the municipal electric system create a separate division to provide cable/Internet services. Although the Cable Act identifies various financing methods for cable/Internet ventures (including the issuance of bonds and the making of inter-division loans), it expressly prohibits, at Tennessee Code Annotated Section 7-52-603, a municipal electric utility from subsidizing the operations of the cable/Internet venture: “[a] municipal electric system may not subsidize the operations of the [cable/Internet] division with revenues from its power or other utility operations.” (Emphasis added). In that same section, the Cable Act further states that “[a] municipal electric system providing any of the services authorized by this part shall fully allocate any costs associated with the services provided under this part to the rates for those services.”

Comcast then alleged that EPB approved several business plans for installing a “Fiber to the Home” network that would allow EPB to provide cable and internet services. Comcast

¹ Tenn. Code Ann. § 7-52-601 *et seq.*, is referred to as the “Cable Act” by the parties. For purposes of clarity, we will use that same reference.

claimed that EPB intended to use electric revenues to support the bond debt obligations for financing the Fiber to the Home network and its overall business plan. According to Comcast, this would result in EPB “obtaining all of the infrastructures and equipment necessary to provide cable/Internet services for only a fraction of the cost that would be required of a free market competitor.” In the complaint, Comcast acknowledged that the actions of EPB also were being challenged in Davidson County. According to Comcast:

The Tennessee Cable Telecommunications Association (the “TCTA”) is a trade organization whose members are primarily owners and operators of franchised cable television systems throughout the state of Tennessee. Comcast is a member of the TCTA. On September 21, 2007, TCTA filed a Complaint in Davidson County Chancery Court asserting the EPB’s stated course of conduct ran afoul of the Cable Act’s prohibition on cross-subsidization. TCTA sought a declaration as to the illegality of EPB’s conduct and an order prohibiting EPB from proceeding with its cable/Internet venture as described in the Business Plan and Summary Plan.

* * *

On April 14, 2008, the Davidson County Chancery Court dismissed the TCTA lawsuit, primarily based on the conclusion that venue was not proper in Nashville, that the Court did not have jurisdiction and that TCTA did not have standing. The case was dismissed before any discovery was taken. TCTA believes that the Court’s dismissal was not appropriate. It intends to continue pursuing the Davidson County case.

In the present case, Comcast sought a declaratory judgment that “EPB’s stated and current course of conduct involves illegal cross-subsidization prohibited by the Cable Act.” Comcast also sought an order prohibiting EPB from moving forward until “all cross-subsidization issues are addressed and corrected.”

EPB responded with a motion to dismiss the complaint or, in the alternative, to stay the proceedings. According to this motion:

EPB requests that this Court exercise its inherent power [to] stay this action pending a resolution of the first filed lawsuit currently pending before the Chancery Court for Davidson County, Tennessee (the “First Filed Action”). The First Filed Action was instigated months before this lawsuit was filed and involves the same subject matter and substantially the same parties. Accordingly, the doctrine of prior suit pending results in a lack of subject matter jurisdiction in this Court and Comcast’s Complaint should be dismissed. Even if Comcast

were not inappropriately attempting to relitigate issues currently pending before another court, its claims would nevertheless be improper because they concern a speculative, hypothetical future cross-subsidy and fail to raise a ripe issue for adjudication. Finally, Comcast's Complaint is also deficient in that it seeks to assert causes of action that are preempted by federal law.

Various pleadings from the Davidson County lawsuit were attached to the motion to dismiss. Among them was an order entered by the Davidson County Chancery Court summarizing the complaint in that case as asserting that the various operating plans of EPB ultimately will require EPB "to subsidize the cable/Internet in violation of section 7-52-603."² The Davidson County Chancery Court ultimately dismissed the claims pending in that court for "lack of jurisdiction which also deprives the Court of venue." The court also decided other issues raised by EPB in the event that it was incorrect in its ruling as to jurisdiction and venue. In so doing, the court found that the claims did not present a justiciable controversy and, therefore, were not ripe. Finally, the court determined that TCTA did not have standing to bring the lawsuit. Following a denial of TCTA's motion to alter or amend the judgment, TCTA filed a notice of appeal to the Middle Section of this Court. That appeal is pending.

Returning to the present case, the Trial Court denied EPB's motion to dismiss which claimed that the prior suit pending doctrine barred the present case. According to the Trial Court:

EPB argues that this court does not have jurisdiction to consider Comcast's Complaint under the prior suit pending doctrine. Earlier in 2007, the Tennessee Cable Telecommunications Association ("TCTA"), of which Comcast is a member, sued EPB in the Chancery Court for Davidson County, case number 07-02145. The case was assigned to Chancellor Ellen Hobbs Lyle. She dismissed the case on April 14, 2008, as a result of EPB's second effort.

Then, this case was filed in Hamilton County by Comcast. However, TCTA filed a Motion to Alter or Amend the Judgment in Davidson County on May 12, 2008. Counsel for EPB argued that the pendency of the Davidson County litigation deprived this court of subject matter jurisdiction. There were two lawsuits in two State courts seeking the same basic relief.

The court rejects this ground as a basis for relief to EPB. First, Chancellor Lyle has denied TCTA's Motion to Alter or Amend Judgment by Order filed June 27, 2008. There is a question about

² In addition to sharing the same primary issue involving allegations of illegal cross-subsidization, the lawsuit filed in Nashville and the present lawsuit also share most of the same attorneys.

whether the TCTA lawsuit is pending or not. EPB filed a Supplemental Memorandum on June 30, 2008, that sets forth its contention that the first case is always pending until there is a Final Order entered and/or the time for appeal has expired. The Order of Chancellor Lyle . . . filed on June 27, 2008, overruling TCTA's Motion to Alter or Amend Judgment, may or may not be final before this case in Hamilton County is finally resolved. The Davidson County decision may be appealed, which EPB contends means the first case filed in Davidson County is still pending.

Second, this court does not believe that the TCTA lawsuit would bar this lawsuit, even though it seeks the same relief as Comcast does in this case, because Tenn. Code Ann. § 7-52-609 provides:

Civil actions. – A franchisee under chapter 59 of this title operating in the service area of the municipal electric division providing services under this part may bring a civil action for injunctive or declaratory relief for a violation under this part, and may recover actual damages upon a showing of a willful violation under this part. Jurisdiction and venue for such action shall be in the chancery court in the county where the alleged violation is occurring or will occur. Such actions shall be scheduled for hearing as a priority by the court.

Based upon this statute, the court would not dismiss or stay Comcast's Complaint for two reasons. One, TCTA is not a franchisee under Chapter 59. TCTA is comprised of franchisees, including Comcast. TCTA has the same interest and points of view as its members, who are franchisees. However, TCTA is not a franchisee. In this court's view, TCTA did not have "standing" to file the lawsuit in Davidson County. Section 609 limits lawsuits to franchisees.

Two, jurisdiction and venue for any such civil action are in the county where the alleged violation "is occurring or will occur." If there is, or will be, a violation of the law by EPB, such will occur in Hamilton County, not Davidson County, in this court's view.

It is upon this second reason, § 7-52-609, that the court strongly relies upon in reaching its decision on the first legal position advanced by EPB. The court makes this ruling despite TCTA's seeking the same basic ruling and relief in Davidson County that

Comcast is seeking in this court. TCTA is the wrong plaintiff that filed in the wrong court.

After concluding that the doctrine of prior suit pending did not apply to this case, the Trial Court then held that Comcast's claims were not ripe. The Trial Court's reason for this was that, so far, there had not been any improper subsidization and there might not be any in the future. If and when any improper subsidization occurs, then the claim will be ripe at that point in time. Finally, the Trial Court held that because the plan at issue had specifically been approved by the federal Tennessee Valley Authority, the state law claim was preempted. Because the state law claims were not ripe for review and, even if they were, because they were preempted by federal law, the Trial Court granted EPB's motion to dismiss.

Comcast appeals claiming the Trial Court erred when it determined that: (1) the claims were not ripe for review; and (2) the claims in the complaint were preempted by federal law. EPB also appeals. Although EPB raises several issues, the dispositive issue it raises is whether the Trial Court erred when it found that the doctrine of prior suit pending did not bar the present action.

Discussion

We first will discuss whether the Trial Court correctly determined that the doctrine of prior suit pending did not apply in this case, an issue which, as noted above, we find dispositive. Our standard of review as to the granting or denial of a motion to dismiss is set out in *Stein v. Davidson Hotel Co.*, 945 S.W.2d 714 (Tenn. 1997). In *Stein*, our Supreme Court explained:

A Rule 12.02(6), Tenn. R. Civ. P., motion to dismiss for failure to state a claim upon which relief can be granted tests only the legal sufficiency of the complaint, not the strength of a plaintiff's proof. Such a motion admits the truth of all relevant and material averments contained in the complaint, but asserts that such facts do not constitute a cause of action. In considering a motion to dismiss, courts should construe the complaint liberally in favor of the plaintiff, taking all allegations of fact as true, and deny the motion unless it appears that the plaintiff can prove no set of facts in support of her claim that would entitle her to relief. *Cook v. Spinnaker's of Rivergate, Inc.*, 878 S.W.2d 934, 938 (Tenn. 1994). In considering this appeal from the trial court's grant of the defendant's motion to dismiss, we take all allegations of fact in the plaintiff's complaint as true, and review the lower courts' legal conclusions *de novo* with no presumption of correctness. Tenn. R. App. P. 13(d); *Owens v. Truckstops of America*, 915 S.W.2d 420, 424 (Tenn. 1996); *Cook, supra*.

Stein v. Davidson Hotel Co., 945 S.W.2d 714, 716 (Tenn. 1997).

Our Supreme Court recently discussed the doctrine of prior suit pending in *West v. Vought Aircraft Indus., Inc.*, 256 S.W.3d 618 (Tenn. 2008). The *West* Court stated as follows, with all footnotes being in the original but renumbered:

The prior suit pending doctrine is derived from the ancient common-law rule prescribing that a person “shall not be ... twice vexed for one and the same cause.” *Sparry’s Case*, (1591) 77 Eng. Rep. 148, 148 (Exch.); *accord Ex parte State Mut. Ins. Co.*, 715 So. 2d 207, 213 (Ala. 1997). Under the common-law rule, a party could have an action barred on procedural grounds if there was a prior suit pending against him in the same jurisdiction for the same cause of action. 1 William M. McKinney, *The Encyclopædia of Pleading and Practice: Under the Codes and Practice Acts, at Common Law, in Equity and in Criminal Cases* 750-51 (Northport, Edward Thompson Co. 1895); *Sparry’s Case*, 77 Eng. Rep. at 148.

* * *

In time, the prior suit pending doctrine became a fixture of American common law. *See, e.g., Commonwealth v. Churchill*, 5 Mass. (5 Tyng) 174, 176 (1809); *Bennett v. Chase*, 21 N.H. 570, 580 (1850); *Bullock v. Bolles*, 9 R.I. 501, 502 (1870). The doctrine appears to have been well-established in this state as early as 1838. *See Turner v. Lumbrick*, 19 Tenn. (Meigs) 7, 8, 12-13 (1838) (noting that the defendants moved to quash the proceedings on the grounds that an identical lawsuit between the same parties was already pending). In *Cockburn v. Howard Johnson, Inc.*, 215 Tenn. 254, 385 S.W.2d 101 (1964), we affirmed that “a suit is subject to plea in abatement³ where there is pending another suit on the same subject matter.” 385 S.W.2d at 102. We also held that there are four essential elements to a defense of prior suit pending: 1) the lawsuits must involve identical subject matter; 2) the lawsuits must be between the same parties;⁴ 3) the former lawsuit must be pending in a court having subject matter jurisdiction over the dispute; and 4) the former lawsuit must be pending in a court having personal

³ A plea in abatement is a common-law pleading that “sets forth facts extrinsic to merits which affect only manner in which action is framed or circumstances under which it is sought to be prosecuted, and does not destroy the right of action but merely suspends or postpones its prosecution.” *Black’s Law Dictionary* 1151-52 (6th ed. 1990). Pleas in abatement have been abolished and replaced by modern pleadings and motions. *See* Tenn. R. Civ. P. 7; 1 Tenn. Jur. *Abatement, Survival and Revival* § 2 (2001).

⁴ Although *Cockburn* states that the lawsuit must be between the same parties, we have held previously that the doctrine of prior suit pending may also be applicable when a party in a subsequent lawsuit is the privy of a party in the former lawsuit. *Fultz v. Fultz*, 180 Tenn. 327, 175 S.W.2d 315, 316 (1943).

jurisdiction over the parties. *Id.* (quoting Joseph Carrigan Higgins & Arthur Crownover, Jr., *Tennessee Procedure in Law Cases: A Treatise Setting Forth the Principles, Pleadings, Practice, and Procedure in Lawsuits*, § 518(6) (1937)).⁵

West, 256 S.W.3d at 622-623.

We will now examine the four elements needed to establish the defense of prior suit pending as applicable to this case now before us. The issues set forth by Comcast and TCTA in the two lawsuits are the same. Both lawsuits claim that EPB is improperly subsidizing its cable/internet project with funds from the electric utility. Both lawsuits seek a declaration that the plans utilized by EPB are in direct violation of Tenn. Code Ann. § 7-52-603. If TCTA ultimately is successful in its lawsuit filed in Davidson County, then there will be a trial court opinion and likely an appellate court opinion finding a violation of Tenn. Code Ann. § 7-52-603. Such a decision would make Comcast's lawsuit pointless. For example, if the Middle Section of this Court or the Tennessee Supreme Court ultimately concludes that TCTA is entitled to a declaration that EPB is violating Tenn. Code Ann. § 7-52-603, that certainly would render this litigation moot. We conclude that the first element has been established.

With regard to the second element, EPB must show that the lawsuits are between the same parties. We again note that Comcast is a member of TCTA and their interests in these lawsuits are identical. As noted by the Supreme Court in *West*, the doctrine of prior suit pending can apply if the parties are in privity. *West*, 256 S.W.3d at 623 n.4. *See also Roy v. Diamond*, 16 S.W.3d 783, 790 (Tenn. Ct. App. 1999) (“Even though the plaintiffs are not identical in both cases, we consider them sufficiently similar so as to make no practical difference.”) (citing *Cockburn v. Howard Johnson, Inc.*, 385 S.W.2d 101, 102 (Tenn. 1964)) (“The defendants in these two cases are not identical but are in effect the same.”)). *Accord, Fidelity & Guaranty Life Insurance Co. v. Corley*, No. W2002-02633-COA-R9-CV, 2003 WL 23099685 (Tenn. Ct. App. Dec. 31, 2003). We conclude that Comcast and TCTA are sufficiently similar as to make no practical difference, and the second element has been met.

The third and fourth elements involve whether the court where the first lawsuit was filed has both subject matter jurisdiction over the dispute and personal jurisdiction over the parties. There are several issues on appeal from the decision of the trial court in the Davidson County lawsuit. One of these issues is whether the trial court erred in “dismissing the Complaint for Lack

⁵ In addition to those requirements set forth in *Cockburn*, we have recognized at least two other limitations on the applicability of the prior suit pending doctrine. We have held that the prior suit pending doctrine is inapplicable when the prior lawsuit has been dismissed or discontinued. *Walker v. Vandiver*, 133 Tenn. 423, 181 S.W. 310, 311 (1915). In other words, the prior lawsuit must continue to be “pending” in order for a subsequent lawsuit to warrant dismissal. *See id.* We have also held that the doctrine is inapplicable when the prior lawsuit was brought in a federal court or in the court of a foreign state. *Hubbs v. Nichols*, 201 Tenn. 304, 298 S.W.2d 801, 802-03 (1956). There is, however, an exception to this latter rule. In cases involving in rem or quasi in rem jurisdiction, a prior suit pending in a federal court or in the court of another state will prevent a party from bringing a second lawsuit in Tennessee. *Id.* at 803.

of Jurisdiction and Improper Venue.”⁶ Thus, one or both of the jurisdictional issues is at issue on the appeal of the Davidson County lawsuit. Of course, that opinion, when issued, very well may resolve the jurisdictional prerequisite for application of the prior suit pending defense. The Davidson County lawsuit is still “pending” until the appeal is resolved. *See Creech v. Addington*, No. E2006-01911-SC-R11-CV, — S.W.3d —, 2009 WL 838102, at *11 (Tenn. Mar. 31, 2009)(noting that Tennessee and a minority of jurisdictions follow the rule that a judgment is not final and res judicata while an appeal is pending). If it is determined on appeal in the Davidson County lawsuit that the Davidson County Chancery Court did not have either subject matter jurisdiction over the dispute or personal jurisdiction over the parties, then at that time the prior suit pending defense will be eviscerated and the present case can proceed in Hamilton County. However, until that happens, these two essentially identical lawsuits cannot both be allowed to proceed at the same time.

Because EPB has established the necessary elements of its prior suit pending defense, we conclude that the Trial Court erred when it concluded otherwise. Thus, while we agree with the Trial Court that this case should be dismissed, we do so on a different basis. *See Shutt v. Blount*, 249 S.W.2d 904, 907 (Tenn. 1952)(“[I]f the Trial Judge reached the right result for the wrong reason, there is no reversible error.”). The judgment of the Trial Court is vacated to the extent the Trial Court dismissed the action because it was not ripe and because it was preempted as these issues are pretermitted. The judgment of the Trial Court is affirmed as so modified, and this case is dismissed without prejudice.

Conclusion

The judgment of the Trial Court is affirmed as modified and this case is dismissed without prejudice. This case is remanded to the Trial Court solely for the collection of costs below. Costs on appeal are taxed to the Appellant, Comcast of the South, and its surety, for which execution may issue, if necessary.

D. MICHAEL SWINEY, JUDGE

⁶While the present appeal was pending, EPB filed a motion asking this Court to take judicial notice of the Notice of Appeal and the brief filed by TCTA in the appeal pending in the Nashville case. That motion is granted.